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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte FRANK COLLETTI and CHARLES RAUTH

Appeal 2009-010501
Application 10/674,597
Technology Center 3700

Before JOHN C. KERINS, MICHAEL W. O'NEILL and FRED A.
SILVERBERG, *Administrative Patent Judges*.

KERINS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Frank Colletti and Charles Rauth (Appellants) seek our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 1-7, all of the claims currently pending in the application. We have jurisdiction under 35 U.S.C. § 6(b) (2002). We AFFIRM.

THE INVENTION

Appellants' claimed invention is to an insulating face mask. Independent claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A face mask comprising:

A mask member made of an insulating and elastic fabric which is sized and shaped to fit snugly about the forehead, face, gullet and ears of a user and having a top perimeter proximately and contoured along the juncture where the top of the forehead meets the scalp and co-linearly extending to width perimeters just past the left and right ear areas, and a height defined by the top perimeter and a bottom perimeter in the gullet area extending proximately along the intersection formed between the neck and the underside of the jaw;

Said mask member having a first aperture means formed therein to register with the eyes of the user allowing the passage of light therethrough;

Said mask member having a second aperture means formed therein positioned to register with the nostrils of the nose for passage of air therethrough;

Said mask member having a third aperture means formed therein to register with the mouth for the passage of air and sound therethrough;

Said mask member having a fourth and a fifth aperture means formed therein, one for each ear, to register with the ears for the passage of sound therethrough; and

A securing strap unitarily formed with said mask member at each left and right width perimeter of the mask member, each said strap having a top and bottom edge extending generally in-line with the respective top and bottom perimeters of the mask member to form a tapering height as the straps extend rearward about the lower hemisphere of the head and co-join in the back of the head at the base of the skull, said straps co-acting with the mask member to form a seal between the user and the mask member along the top and bottom perimeters of the mask member.

THE REJECTION

The Examiner has rejected claims 1-7 under 35 U.S.C. § 103(a) as being unpatentable over Edwards (US 4,300,240, issued November 17, 1981) in view of Wilcox (US 891,122, issued June 16, 1908).

ISSUE

Did the Examiner err in concluding that it would have been obvious to a person of ordinary skill in the art to modify the Edwards face mask, in view of the teachings of the Wilcox patent, to have the top perimeter of the mask extending where the top of a user's forehead meets the scalp and to include apertures for the eyes and ears?

ANALYSIS

Appellants argue claims 1-4 as a group, and claims 5-7 as a group. (Appeal Br. 12). We will take claims 1 and 5 as representative of the groups, and claims 2-4 and claims 6 and 7 will stand or fall with claim 1 and claim 5, respectively. Appellants' argument for the patentability of method claims 5-7 is that the method claims are patentable because they are drawn to producing a patentable product. (Appeal Br. 18).

The Examiner concluded, in view of the teachings in Wilcox of a face protector having a top perimeter located along the juncture of where the forehead meets the scalp and having openings for the eyes, mouth, ears and nose, that it would have been obvious to modify the face mask of Edwards to have the top perimeter at the forehead/scalp juncture and to provide eye, mouth, ear and nose openings, for the purpose of effectively protecting the wearer's face, eyes and nose, without causing discomfort. (Ans. 4). In responding to Appellants' arguments for patentability, the Examiner stresses that the proffered combination of teachings of Edwards and Wilcox resulting in the modification to the Edwards mask meets all of the structural limitations of the claims. (Ans. 5-6). We agree.

Appellants attempt to distinguish their invention from the cited prior art by noting that both prior art references are fitted to the user with the nose of the user operating to aid in securing the mask to the wearer's face, whereas the "overall triangular Vee shape" with its "'three-point' anchoring design-by applying pressure at points along the forehead, underside of the jawbone/gullet, and rear base of the skull" works to alleviate pressure on the nose. (Appeal Br. 16). Appellants further contend that their "invention's figure-8 aperture for the eyes creates the Vee-split that spans to critically function at the forehead, gullet, and rear base of the skull", which avoids use of the nose as a pressure/anchor point. (Appeal Br. 17). These features are not specifically recited in claim 1, rather the claim calls for the mask member to be "sized and shaped to fit snugly about the forehead, face, gullet and ears of a user". (Appeal Br., Claims Appendix, Claim 1). Appellants have not demonstrated that the Examiner-proposed modified Edwards mask would not meet this limitation.

Appellants argue further that both Edwards and Wilcox fail to "evoke thought to avoid the nose", and that if the references are combined as proposed, the resulting structure would destroy the intended function of applying pressure to the nose to hold the mask secure. (Appeal Br. 16-17). While, as Appellants point out, Wilcox does note in his patent claim that the nose piece of the mask serves to hold the body piece from moving about on the face of the wearer, Wilcox elsewhere notes that the nose-covering flap is to "loosely cover the nose for affording proper protection thereto without causing discomfort to the wearer" and "to permit the wearer to breathe freely". (Wilcox, p. 1, ll. 59-61; p. 1, l. 64). Wilcox thus evidences a thought to avoid applying significant pressure to the nose, contrary to

Appellants' assertion. Further, the portion of Edwards (col. 1, ll. 62-67) that Appellants contend discloses "anchoring" the mask to the wearer's nose merely discloses that "[t]he nose piece is contoured to fit over the nose".

Nowhere does either reference clearly identify that a critical function of the mask is to apply pressure to the nose to retain the mask in place. Rather, the references merely describe that the mask design should be such as to retain the mask in place. Appellants have not shown that the modified Edwards mask design would not stay in place on the user's face, and the argument that the modified Edwards mask would destroy the intended function of either the Edwards or Wilcox mask is therefore not persuasive.

Appellants further baldly assert that Edwards and Wilcox do not teach, and instead teach away from, the present invention. (Appeal Br. 18). These contentions are apparently grounded in Appellants' position that the masks in these prior art references require applying significant pressure to the nose in order for the nose to serve as an anchor point. Neither reference individually supports that proposition, and thus we are not persuaded that the prior art teaches away from the claimed invention, in either structure or function.

The rejection of claims 1-4 as being unpatentable over Edwards and Wilcox will be sustained.

Finally, Appellants contend, with respect to method claims 5-7, that "[i]t is axiomatic that a known process cannot be *prima facie* obvious when, as claimed, it produces a material that is patentable". (Appeal Br. 18). Since we have above concluded that the Examiner's rejection of the product claims is to be sustained, Appellants' argument here is not persuasive of patentability of the method claims.

CONCLUSION

The Examiner did not err in concluding that it would have been obvious to a person of ordinary skill in the art to modify the Edwards face mask, in view of the teachings of the Wilcox patent, to have the top perimeter of the mask extending where the top of a user's forehead meets the scalp and to include apertures for the eyes and ears.

DECISION

The decision of the Examiner to reject claims 1-7 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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